SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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ROOSEVELT LEE LIMITED PARTNERSHIP,

Plaintiff,

- v -

32 HAIR STUDIO, INC. d/b/a HIDY HAIR STUDIO and HAE SOOK SUNG,

Defendants.

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INDEX NO. 156193/2016

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion for SUMMARY JUDGMENT.

In this landlord-tenant dispute, plaintiff Roosevelt Lee Limited Partnership ("Roosevelt Lee") moves for summary judgment against defendants 32 Hair Studio, Inc. d/b/a Hidy Hair Studio ("32 Hair Studio") and Hae Sook Sung ("Sung") under CPLR 3212. Defendants oppose the motion and cross-move for summary judgment in their favor. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion and cross motion are **decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND:

On April 30, 2007, plaintiff Roosevelt Lee and defendant 32 Hair Studio entered into a commercial lease agreement for the premises located at 34-36 West 32d Street in Manhattan. (Docs. 20 at 1; 24 at 2.) The lease was for a ten-year term lasting from May 1, 2007, through April 30, 2017. (Docs. 20 at 2; 24 at 2.) During the first year of the lease, monthly rent was affixed at $10,000.00. (Docs. 20 at 2–3; 24 at 2.) For each year thereafter, the lease provided that monthly

rent would increase at a yearly compound rate of three percent. (Docs. 20 at 3; 24 at 2.) Defendant Sung executed a personal guaranty, which guaranteed the full performance of the lease's obligations. (Doc. 24 at 14.)

Around January of 2014, defendants began making only partial rent payments to Roosevelt Lee. (Doc. 20 at 4.) For two years—from January of 2014 through December of 2015—they consistently paid $8,000.00 per month, even though the base rent had compounded to $12,298.74 for 2014 and $12,667.70 for 2015. (*Id.* at 4–5.) Defendants completely stopped making rent payments in 2016. (*Id.* at 5.) In light of the arrearage, Roosevelt Lee commenced a landlord-tenant proceeding styled *Roosevelt Lee L.P. v 32 Hair Studio Inc.*, Civil Court of the City of New York, Index Number 54666/2016. (*Id.*) That action was settled via a stipulation of settlement entered into on April 5, 2016. (*Id.*) Under the terms of the settlement stipulation, judgment of possession was entered in favor of Roosevelt Lee (*id.*), and defendants were to vacate the premises by May 2, 2016 (*id.*). Defendants did so. (*Id.*) By May of 2016, the balance of rent due was $229,222.58. (*Id.*) However, the stipulation further provided that Roosevelt Lee's claim for unpaid rent was to be severed. (*Id.*) A copy of this stipulation has been provided by the parties as NYSCEF Doc. 26.

On July 26, 2016, Roosevelt Lee commenced the instant action by filing a summons and complaint against defendants to collect the unpaid rent. (Doc. 21 at 1–4.) In the complaint, plaintiff alleges the following three causes of action: (1) breach of the commercial lease by defendants; (2) a cause of action for attorneys' fees, which plaintiff says it is entitled to recover pursuant to the lease; and (3) that defendant Sung is also liable due to his execution of a personal guaranty. (*See id.*) Defendants filed their answer on February 7, 2017, asserting several affirmative defenses. (*Id.* at 8–10.) The fourth and fifth affirmative defenses are presently at issue. The fourth affirmative defense states that plaintiff waived its right to claim unpaid rent through an oral modification of

the lease to accept a lower amount of monthly rent, and that plaintiff accepted such lower monthly rent for over one year. (*Id.* at 9.) The fifth affirmative defense states that the personal guaranty is unenforceable due to the alleged waiver.[1] (*Id.*)

Pursuant to CPLR 3212, Roosevelt Lee now moves for summary judgment against defendants. In doing so, plaintiff has stressed that it is not seeking to hold them liable for the remainder of the lease term, which, again, expired in April of 2017. (Doc. 20 at 6.) Instead, plaintiff is only seeking the unpaid balance through May 1, 2016, just before defendants were evicted on May 2, 2016. (*Id.*) Thus, after deducting defendants' security deposit of $30,000.00 for the premises (*id.* at 5), plaintiff is currently seeking the $199,222.58 that is due and owing (*id.* at 6). In support of the motion, Roosevelt Lee submits invoices, the stipulation of settlement, an affidavit by Uikun Lee ("Lee"), the general partner of Roosevelt Lee, and—most importantly—the actual lease and the personal guaranty. (Docs. 20; 24–26.) Roosevelt Lee argues that there could have been no oral modification to the written lease because paragraph 52(B) provides to the contrary: "There shall be no modifications hereto other than by written instrument executed by both parties and delivered to each." (Doc. 24 at 22.) Plaintiff also maintains that, even though it accepted lower monthly rent payments from defendants for a period of two years, it did not waive its right to collect the unpaid balances pursuant to paragraph 24 of the lease, which provides that "[t]he receipt by [Roosevelt Lee] of rent . . . with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach and no provision of this lease shall be deemed to have been waived by [Roosevelt Lee] unless such waiver be in writing signed by [Roosevelt Lee]." (*Id.* at 10.) Thus, plaintiff argues that summary judgment should be granted as it established its prima facie case and because, due to the provisions in the lease, defendants' fourth and fifth affirmative

[1] After the instant action was commenced, plaintiff alleges that, during discovery, defendants have failed to comply with multiple discovery conference orders. (Doc. 18 at 2.)

defenses—which are premised on an alleged oral modification to the lease—must fail. (Doc. 18 at 6.) Further, in his affidavit, Lee testifies that no such oral modification to the lease was ever made between the parties. (Doc. 20 at 7.)

In opposition, Sung, the president of 32 Hair Studio, argues that the fourth and fifth affirmative defenses in his answer preclude summary judgment in plaintiff's favor. He alleges that an oral modification for lower rent was made between plaintiff and defendants around December of 2013 or January of 2014. (Doc. 29 at 2.) According to him, Roosevelt Lee willingly made this modification because it had trouble renting out the space to other potential tenants; in other words, it made sense for Roosevelt Lee to continue receiving some money from defendants than nothing at all. (*Id.*) Moreover, defendants contend that they should be awarded summary judgment because the oral modification is enforceable under the doctrine of equitable estoppel. (Doc. 36 at 1–2.) Specifically, defendants assert that they have substantially relied on the modification and that there was partial performance thereof. (*Id.* at 2–3.)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then

summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

Under New York General Obligations Law § 15-301(1), a contract containing a clause against oral modification "cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought . . . ." Thus, "[w]here, as here, a lease contains a clause requiring modification of its terms to be in a writing signed by the landlord, oral modification is generally precluded." (*Aris Industries, Inc. v 1411 Trizechahn-Swig, LLC*, 294 AD2d 107, 107 [1st Dept 2002].) Caselaw, however, has made it clear that there are instances when an oral modification to a written contract may be enforced. For example, in *Rose v Spa Realty Assocs.*, 42 NY2d 338 (1997)—a case cited by defendants—our Court of Appeals delineated two exceptions to the general rule. First, an oral amendment may be enforced where there is partial performance. (*Id.* at 343–44.) "[O]nly if the partial performance be unequivocally referable to the oral modification is the requirement of a writing under section 15-301 avoided." (*Id.*) "The unequivocally referable standard requires that the conduct must be explainable only with reference to the oral agreement." (*Nassau Beekman, LLC v Ann/Nassau Realty, LLC*, 105 AD3d 33, 39 [1st Dept 2013] (internal quotations omitted).) Second, and "[a]nalytically distinct from the doctrine of partial performance," an oral change to a written contract may be enforced under the principle of equitable estoppel. (*Id.* at 344.) "Once a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification." (*Id.*)

Keeping the foregoing in mind, this Court finds that plaintiff has satisfied its prima facie case of entitlement to judgment as a matter of law as against 32 Hair Studio. Roosevelt Lee has

submitted invoices reflecting the amount of debt alleged to be owed. (Doc. 25.) The first page of the lease obligated 32 Hair Studio to pay the monthly rent: "Tenant shall pay the rent as above and as hereinafter provided." (Doc. 24 at 2.) In contesting its liability, 32 Hair Studio failed to raise a triable issue of fact, and this Court concludes that the affirmative defenses of partial performance and equitable estoppel are inapplicable. With respect to partial performance, it cannot be said that plaintiff's acceptance of payment from defendants below the monthly rent is "unequivocally referable" to any alleged oral modification. One can easily imagine a situation where defendants tendered $8,000.00 for monthly rent instead of the compounded rate of $12,667.70, not because of an oral agreement to lower the rent to that amount, but because 32 Hair Studio simply could not afford the full rent. (*See Joseph P. Day Realty Corp. v Jeffrey Lawrence Assocs., Inc.*, 270 AD2d 140, 142 [1st Dept 2000] (rather than being indicative of an oral modification, departure from a lease's terms "is equally or even more consistent with a breach of the lease"); *Bank of Smithtown v 264 W. 124 LLC*, 105 AD3d 468, 469 [1st Dept 2013] (holding that partial performance did not apply because defendants' payment of arrearage was "reasonably explained" by their legal obligation to make those payments).) Moreover, plaintiff's actions go just the opposite way: The invoices establish that plaintiff tracked defendants' deficiencies for two years (Doc. 25), and that plaintiff even instituted an eviction proceeding against them (*see* Doc. 26). It is hard to see why plaintiff would have commenced this eviction proceeding for the unpaid rent had plaintiff and defendants actually entered into an oral modification lowering the monthly rent.

With respect to the doctrine of equitable estoppel, this Court also determines that it is inapplicable to the facts herein. "Comparable to the requirement that partial performance be unequivocally referable to the oral modification, so, too, conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written." (*Riverside Research Institute v*

KMGA, Inc., 108 AD2d 365, 368 [1st Dept 1985].) Again, the facts described above—defendants' deficient payment of rent and plaintiff's acceptance thereof—are compatible with the lease's obligations. In addition, because paragraph 52(B) of the lease stated that "[t]here shall be no modifications hereto other than by written instrument executed by both parties and delivered to each" (Doc. 24 at 22), defendants were not justified in relying on the alleged oral agreement to modify the lease terms. (*See Weiss v Halperin*, 149 AD3d 1143, 1145 [2d Dept 2017] (employing the same reasoning).)

Defendant Sung is also liable pursuant to the personal guaranty. Importantly, Sung executed the guaranty in writing (*Paribas Properties, Inc. v Benson*, 146 AD2d 522, 525 [1st Dept 1989] ("To be enforceable, a special promise to answer for the debt or default of another must be in writing and subscribed to by the party against whom enforcement is sought.")), and the guaranty references the lease (Doc. 24 at 14). Furthermore, the guaranty clearly obligates Sung to ensure satisfaction of 32 Hair Studio's responsibilities under the lease, and no condition limiting his liability appears in the guaranty. In pertinent part, the guaranty states that "[Sung] guarantees to [Roosevelt Lee] . . . the full performance and observance of all the covenants, conditions and agreements, therein provided to be performed and observed by [32 Hair Studio] . . . ." (*Id.*) "[W]here a guaranty is clear and unambiguous on its face and, by its language, absolute and unconditional, the signer is conclusively bound by its terms absent a showing of fraud, duress or other wrongful act in its inducement." (*Citibank, N.A. v Uri Schwartz & Sons Diamonds Ltd.*, 97 AD3d 444, 446–47 [1st Dept 2012].) Thus, the guaranty, in conjunction with the lease, establishes that Sung is liable for unpaid rent.

Plaintiff has also shown that the lease permits it to obtain attorneys' fees, and has submitted an affirmation showing the calculation of such fees. (Docs. 19; 24 at 8–9.) Plaintiff's motion for summary judgment is therefore granted, and defendants' cross-motion is denied.

In light of the foregoing, it is hereby:

ORDERED that plaintiff Roosevelt Lee Limited Partnership's motion for summary judgment against defendants 32 Hair Studio, Inc. d/b/a Hidy Hair Studio and Hae Sook Sung is granted; and it is further

ORDERED that defendants' cross-motion for summary judgment is denied; and it is further

ORDERED that plaintiff's counsel is to serve a copy of this order, with notice of entry, on all parties and on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within 30 days after the entry of this order onto NYSCEF; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of plaintiff in the amount of $199,222.58 with statutory interest from May 2, 2016, plus attorneys' fees in the amount of $2,310.00 together with costs and disbursements to be taxed by the Clerk of the Court; and it is further

ORDERED that this constitutes the decision and order of this Court.

4/30/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE